BEFORE THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION

IN RE:	
Analysis of Continued Availability of Unbundled Local Switching for Mass Market Customers Pursuant to the Federal Communication Commission's Triennial Review Order	Docket No. 2003-326-C
And	
Continued Availability of Unbundled High Capacity Loops at Certain Locations and Unbundled High Capacity Transport on Certain Routes Pursuant to the Federal Communication Commission's Triennial Review Order	Docket No. 2003-327-C

VERIZON SOUTH INC.'S RESPONSE IN OPPOSITION TO THE PETITION OF COMPSOUTH FOR EMERGENCY DECLARATORY RULING

Verizon South Inc. ("Verizon") files this Response in Opposition to the Petition for Emergency Declaratory Ruling filed by the Competitive Carriers of the South, Inc. ("CompSouth") on May 27, 2004. In its Petition CompSouth asks the Commission to:

> declare that *BellSouth* is required to maintain the status quo and to honor existing interconnection agreements and to issue an emergency declaratory ruling that (1) requires *BellSouth* to continue to honor the obligations contained in its Interconnection Agreements, including its obligation to seek amendments to existing interconnection agreements through the processes contained in those agreements, to effectuate changes in law, unless and until the Commission approves any modifications to those agreements; and (2) prevents *BellSouth* from taking any unilateral actions under color of *USTA II* to restrict CLECs' access to UNEs or to change prices for UNEs unless and until the Commission approves such changes.

(Petition at 13; emphasis added.)

The Petition does not seek any relief as to Verizon. It seeks relief solely against BellSouth, and is based solely on allegations concerning BellSouth's "actions and

statements." Therefore, the Petition cannot be used as a basis for any action against Verizon.

Even though the Petition does not mention Verizon, Verizon files this response in an abundance of caution, to confirm that it will continue to comply with its interconnection agreements after June 16, 2004, when the D.C. Circuit is scheduled to issue its mandate in *U.S. Telecom Ass'n v. FCC*, 2359 F. 3d 554 (D.C. Cir. 2004) ("*USTA II*").[1] *There is thus no emergency and no risk of imminent disruption to customers once the mandate issues,* and CompSouth has made no such claims as to Verizon. Verizon cannot comment on the BellSouth-specific allegations that are the basis for the Petition, and opposes consideration of any action against Verizon on the basis of a BellSouth-specific request for relief.[2]

I. VERIZON WILL COMPLY WITH ITS INTERCONNECTION AGREEMENTS AFTER JUNE 16.

CompSouth complains that BellSouth has created uncertainty by allegedly refusing to clearly commit to maintaining "the status quo regarding rates, terms and conditions and honor all existing interconnection agreements." (Petition at 8.) Verizon cannot comment on the Petition's claims concerning BellSouth's interconnection agreements. Verizon can only assure the Commission that it is committed to adhering to federal law and its own interconnection agreements with South Carolina CLECs. In most, if not all, cases, those

[1] On June 4, 2004, the D.C. Circuit denied the motions of the FCC and CLECs to extend the stay of the mandate and ordered that it issue on June 16. Neither the FCC nor the Department of Justice will ask the Supreme Court to overturn the D.C. Circuit's *USTA II* decision, so even if other parties appeal, the vacated unbundling rules will "have little chance of remaining in effect." *U.S. Sides With Bells in Battle Over Local Calling*, Wall St. J., June 10, 2004, at A1. "[I]t is rare for the Supreme Court to take a case in which an agency was overturned by an appeals court unless the agency itself files an appeal." Regulatory Sources Associates, LLC, Telecom Regulatory Note, *The FCC Will Not Appeal to the Supreme Court*, June 10, 2004, at 2.

[2] Verizon also does not support initiation of any industry-wide proceeding to address issues related to implementation of the *USTA II* mandate. There is no need for such a proceeding as to Verizon, because its interconnection agreements and voluntary notice periods already provide for an orderly movement to lawful, alternative service arrangements.

agreements expressly permit Verizon, either immediately or after a specified notice period, to discontinue UNEs that it is no longer legally required to provide.

For instance, Verizon's agreements with some of CompSouth members provide, in pertinent part:

Access Point Inc. and Network Telephone Corp.: "if, as a result of any legislative, judicial, regulatory or other governmental decision, order, determination or action...Verizon is not required by Applicable Law to provide any Service...then *Verizon may discontinue the provision of any such Service....Verizon will provide thirty (30) days prior written notice* to [CLEC] of any such discontinuance of a Service."[3]

Covad: "In the event [Verizon] is permitted or required to discontinue any Unbundled Network Element provided to Covad pursuant to this Agreement during the term of this Agreement...[*Verizon*] *shall provide Covad 30 days advance written notice of such discontinuance.*"[4]

KMC Telecom III and KMC Telecom V: "The terms and conditions of this Agreement were composed in order to effectuate the legal requirements in effect at the time this Agreement was produced, and shall be subject to any and all applicable statutes, regulations, rules, ordinances, judicial decisions, and administrative rulings that subsequently may be prescribed by any federal, state or local governmental authority having appropriate jurisdiction. Except as otherwise expressly provided herein, such subsequently prescribed statutes, regulations, rules, ordinances, judicial decisions, and administrative rulings will be deemed to *automatically supersede* any conflicting terms and conditions of this Agreement."[5]

MCI WorldCom and MCImetro Access Transmission Services, LLC ("MCImetro"): "except as otherwise required by Applicable Law, Verizon *may terminate* its

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[3] Access Point Inc. and Network Telephone Corp. Agreements, General Terms and Conditions, § 4.7 (emphasis added); *see also* General Terms and Conditions, § 50.1 ("except as otherwise required by Applicable Law, *Verizon may terminate its offering and/or provision of any Service under this Agreement upon thirty (30) days prior written notice to [CLEC]"*) (emphasis added): UNE Attachment § 1.5 ("if Verizon provides a UNE or Combination to [CLEC], and the Commission, the FCC, a court or other governmental body of appropriate jurisdiction determines or has determined that Verizon is not required by Applicable Law to provide such UNE or Combination, Verizon may terminate its provision of such UNE or Combination to [CLEC]").

[4] Covad Agreement, Article I, § 32.2 (emphasis added); *see also* Article I, ¶ 2 ("Should any services and facilities to be provided to Covad by [Verizon] in satisfaction of this Agreement be modified by an immediately effective Order, including any modifications resulting from Commission proceedings, federal court review or other judicial action...such modifications will be deemed to *automatically supersede* any rates and terms and conditions of this Agreement") (emphasis added).

[5] KMC Telecom III and KMC Telecom V Agreements, Art. II, § 1.2 (emphasis added).

offering and/or provision of any Service under this Agreement *upon ninety (90) days prior written notice* to [CLEC]."[6]

Z-Tel and Momentum: "except as otherwise required by applicable law, *Verizon may terminate* its offering and/or provision of any Service under this Agreement *upon thirty (30) days prior written notice* to [CLEC], unless termination of the offering or Service at issue will require [CLEC] to terminate a service to any of [CLEC]'s existing customers, in which case Verizon will provide ninety (90) days prior written notice to [CLEC]."[7]

Those provisions expressly permit Verizon to cease providing, as UNEs, mass market circuit switching, high-capacity loops and transport, and dark fiber, either immediately upon the issuance of the D.C. Circuit's mandate or within a specified period thereafter.[8] Thus, Verizon's discontinuation of these UNEs will be pursuant to terms to which both parties agreed, in interconnection agreements this Commission approved.

Verizon assures the Commission, however, that it has no intention of disconnecting any CLEC's services as a result of issuance of the D.C. Circuit's mandate, unless, of

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[6] MCI WorldCom and MCImetro Agreements, General Terms and Conditions, § 50.1 (emphasis added); *see also* UNE Attachment, § 1.5 ("Without limiting Verizon's rights pursuant to Applicable Law or any other section of this Agreement to terminate its provision of a UNE or a Combination, if Verizon provides a UNE or Combination to [MCI], and the Commission, the FCC, a court or other governmental body of appropriate jurisdiction determines or has determined that Verizon is not required by Applicable Law to provide such UNE or Combination, Verizon may terminate its provision of such UNE or Combination to [MCI].")

[7] Z-Tel and Momentum Agreements, General Terms and Conditions, § 50.1 (emphasis added); *see also* General Terms and Conditions, § 4.7 ("if, as a result of any legislative, judicial, regulatory or other governmental decision, order, determination or action, or any change in Applicable Law, Verizon is not required by Applicable Law to provide any Service...then Verizon may discontinue the provision of any such Service....Verizon will provide thirty (30) days prior written notice to [CLEC] of any such discontinuance of a Service").

[8] Because the FCC's attempts to expand unbundling beyond the reach of the statute have now been struck down by the federal courts three times, there have never been lawful § 251 unbundling rules binding the ILECs and obligating them to provide local mass market switching, high-capacity loops and transport, and dark fiber as UNEs. Accordingly, upon issuance of the mandate, there will not be a "change of law" to eliminate previously lawful rules requiring provision of UNEs, but merely an affirmation that there have never been lawful UNEs rules to change. Verizon does not waive this argument by choosing to follow the administrative processes set forth in its interconnection agreement that apply to actual changes in law.

course, the CLEC chooses that option.[9] Indeed, faced with the same alarmist claims that CompSouth raises here, the North Carolina Commission found just today that there "is no cause to grant emergency declaratory relief" based on BellSouth's assurances not to act unilaterally once the D.C. Circuit mandate issues.[10] Similarly, in disposing of similar claims as to Verizon that CompSouth raises here as to BellSouth, a New York Public Service Commission administrative law judge recently decided:

> It is understandable that, as the June 15, 2004 deadline approaches, the CLECs are becoming increasingly nervous about a potential interruption in service from Verizon once the vacatur goes into effect. It appears that these fears, at least in the immediate term, are unfounded. Clearly, Verizon agrees...that its rights and obligations with respect to provision of UNEs are governed primarily by its interconnection agreements.[11]

The Florida and Vermont Commissions have, likewise, rejected CLEC requests for "standstill" orders based on Verizon's commitment to follow its interconnection agreements.[12]

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[9] Of course, Verizon retains its existing rights to discontinue service to CLECs that fail to pay undisputed charges for the services they use or that otherwise materially violate the terms of their interconnection agreements.

[10] *In the Matter of Request of the Competitive Carriers of the South, Inc. for an Emergency Declaratory Ruling*, Order Denying Emergency Relief, Docket No. P-100, Sub 133t, at 1-3.

[11] *Petition of Verizon New York Inc. for Consolidated Arbitration to Implement Changes in Unbundled Network Element Provisions in Light of the Triennial Review Order*, Ruling Granting Motions for Consolidation and to Hold Proceeding in Abeyance, Case 04-C-0314, at 7.

[12] *Petition of Verizon New England, Inc. for Arbitration of an Amendment to Interconnection Agreements with CLECs and CMRS Providers in Vermont,* Order re: Motion to Hold Proceeding in Abeyance Until June 15, 2004, Docket No. 6932, at 3-4 (May 26, 2004) ("As to the potential that Verizon may unilaterally alter rates, terms, conditions, and availability of UNEs under existing interconnection agreements, I do not find that it is necessary that I adopt specific conditions limiting Verizon at this time. It is clear that, as a matter of law, Verizon has an obligation to continue to operate under the terms of approved interconnection agreements until this Board approves a change to those terms and conditions."); *In re: Petition for Arbitration of Amendment to Interconnection Agreements with Certain Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Florida by Verizon Florida Inc.*, Order on Motion to Hold Proceeding in Abeyance, Docket No. 04156-TP, at 6 (June 8, 2004) ("As to the request to require Verizon to maintain the status quo for the duration of the proceeding, Verizon has indicated that this is, in fact, its intent. Thus, it does not appear necessary at this time to affirmatively require Verizon to do so.").

After the mandate issues, CLECs in South Carolina can continue providing end-to-end service to their customers on a resale basis under § 251(c)(4), by purchasing special access, or pursuant to commercially-negotiated agreements.[13] As a framework for commercial negotiations, Verizon has announced its Wholesale Advantage offering, which provides all elements available today under UNE-P arrangements, at a commercially reasonable price. In addition, Wholesale Advantage offers CLECs the opportunity to obtain additional services, including voice mail and DSL services, that are not available at resale or as UNEs. Likewise, high capacity transport and loop services will continue to be available through comparable access services or pursuant to commercially negotiated agreements. Finally, CLECs always retain the option of increasing the extent to which they rely on their own or third-party facilities, instead of building their business cases solely on the repackaging of Verizon services.

If CLECs do not opt for commercially-negotiated arrangements, Verizon will give them ample notice — after issuance of the mandate — before providing them service at resale rates (or for high capacity transport and loops, at special access rates). In fact, Verizon intends to give more notice than the change-of-law provisions in its interconnection agreements typically require. Specifically, Verizon will give CLECs at least 90 days' notice after the issuance of the D.C. Circuit's mandate and will continue accepting orders for such UNEs during the notice period.[14] Verizon will also continue to offer its Wholesale

[13] A detailed description of Verizon's plans after the mandate issues is set forth in the Declaration of Virginia P. Ruesterholz, which was filed as an attachment to the Joint Opposition of ILECs to Motions to Stay the Mandate Pending the Filing of Petitions for a Writ of Certiorari, filed by the FCC and CLECs on June 1, 2004 before the D.C. Circuit. A copy of that declaration is attached as Exhibit A.

[14] Indeed, by giving CLECs at least 90 days' notice and moving the CLECs to alternative serving arrangements instead of discontinuing their service, Verizon is forbearing from applying some of the terms of its interconnection agreements, which often require shorter notice or none at all and do not require Verizon to find alternative serving arrangements when a UNE is discontinued. In addition,

Advantage and stands ready to continue commercial negotiations with CLECs during this additional notice period. The service alternatives Verizon is making available, along with the generous notice periods, will ensure uninterrupted service to CLECs and their customers.[15] Therefore, there is no "emergency" and no risk of imminent disruption to customers when the mandate issues—and again, CompSouth has made no such claims with regard to Verizon.[16]

In any event, the CLECs have not asked the Commission to interfere with any interconnection agreements—to the contrary, they have sought (and received) assurances that BellSouth will honor its interconnection agreements.[17] It would be improper and unjustified for the Commission to consider interfering in the orderly implementation of the *USTA II* mandate in accordance with Verizon's effective interconnection agreements. Under federal law, an interconnection agreement, once approved, is "binding." 47 U.S.C. § 252(a). The Commission cannot override the terms of any interconnection agreement by

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wholesale customers will be invited to notify Verizon if they believe that their contract requires longer notice.

[15] Moreover, Verizon expects that CLECs have planned for the eventuality that certain UNEs would be eliminated since the FCC first announced its Triennial Review decision over a year ago. The changes to the FCC's unbundling scheme were addressed in the February 2003 FCC press releases regarding its *Triennial Review Order*, and then made law when the Order was released on August 21, 2003. In addition, the D.C. Circuit's *USTA II* decision vacating the *TRO*'s requirements to unbundle mass-market switching and high capacity facilities was released three *months* ago, so parties that have declined to use the intervening stay to develop processes consistent with that decision have done so at their own peril. This is patently so, given that the *USTA II* holding, whose result was widely predicted even by lay analysts, *e.g., "Court Should Clear UNE-P Mess, Favor RBOCs,"* Lehman Brothers Telecom Services Wireline Industry Update (January 12, 2004), was the third time federal appellate courts have rejected the FCC's UNE rules as inconsistent with the Act and unlawful.

[16] Even as to BellSouth, CompSouth makes only vague claims that BellSouth's alleged statements have caused "uncertainty" that "harms South Carolina consumers." (Petition at 2-3.) CompSouth's unsupported allegations plainly fail to demonstrate any emergency, and BellSouth, in any event, has confirmed that it will not act unilaterally to modify existing interconnection agreements. *See* BellSouth's Response in Opposition to the Petition of CompSouth for Emergency Declaratory Ruling, filed June 4, 2004 (BellSouth's Opposition).

[17] *See* BellSouth's Opposition.

requiring Verizon to continue to provide access to UNEs in circumstances where that agreement authorizes Verizon to stop providing such access.

Nor can the Commission make a generic determination as to whether existing agreement provisions requiring Verizon to provide UNEs will remain effective after the issuance of the D.C. Circuit's mandate. The Ninth Circuit has directly rejected that proposition, holding that a state commission that "promulgate[s] a generic order binding on existing interconnection agreements without reference to a specific agreement or agreements," "act[s] contrary to the [1996] Act's requirement that interconnection agreements are binding on the parties." *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003). *Id.* at 1125-26. As that court explained, "[t]o suggest that [a state commission] could interpret an agreement without reference to the agreement at issue is inconsistent with [its] weighty responsibilities of contract interpretation under § 252." *Id.* at 1128.

Finally, Verizon agrees with CompSouth that parties must use the process established in the *Triennial Review Order* to amend their existing interconnection contracts to reflect the *Order*'s changes in unbundling requirements. (Petition at 10.) The FCC ruled that the timetable for negotiation and arbitration set forth in section 252(b) of the Act—which governs the arbitration of new interconnection agreements under the Act—also applies to amending interconnection agreements pursuant to any of the *Triennial Review Order*'s unbundling requirements and non-self-effectuating limitations. Verizon thus initiated a consolidated arbitration in South Carolina on February 20, 2004, to permit resolution, in the most efficient manner, of any disputes over the appropriate form of a contract amendment with respect to the *Triennial Review Order*. But that amendment proceeding does not affect the parties' rights and obligations under their *existing*

interconnection agreements. Because Verizon is committed to adhering to these agreements, there is no need for an order directing Verizon to do so, and no CLEC has asked the Commission to issue any such order.

II. COMPSOUTH IS MISTAKEN ABOUT THE EFFECT OF D.C. CIRCUIT'S MANDATE

CompSouth argues that issuance of the *USTA II* mandate will not eliminate BellSouth's obligations to provide the UNEs that were the subject of the Court's vacatur, and that the Commission must resolve any disputes about the continued availability of UNEs under BellSouth's change-of-law provisions. (Petition at 11.) In addition, although CompSouth appears to understand that only the FCC can make the impairment findings necessary to impose unbundling obligations,[18] it nevertheless hints that the Commission may have some state law authority to determine the extent to which mass market switching and transport should remain available as UNEs.[19]

Again, Verizon cannot comment on what BellSouth's interconnection contracts may or may not require. Verizon can, however, correct the misleading impression CompSouth may have left about the state of the law after the mandate issues.

First, when the mandate issues, it will, in fact, eliminate the ILECs' obligation to provide mass-market switching and high-capacity facilities. The ILECs provided these items as UNEs because the FCC's rules required them to do so. But the D.C. Circuit expressly struck those rules, for the third time; when the mandate issues, that invalidation

[18] Petition at 11 ("nothing in *USTA II* requires the FCC to find that *any* current UNE may not continue to be required at TELRIC rates...") (emphasis in original).

[19] Petition at 11-12. CompSouth does not cite any North Carolina law; indeed, it refers only to the Commission's "authority to act pursuant to federal or South Carolina law to preserve competition." (Petition at 11.)

will become effective. There will be no rule requiring Verizon or other ILECs to provide mass-market switching and high-capacity facilities.

As Verizon explained above, however, the elimination of the obligation to provide these UNEs does not mean that Verizon will disconnect any CLEC, unless the CLEC chooses that option. Verizon will give even longer notice of the transition away from the designated UNEs than most, if not all, of its interconnection contracts require, and will make available comparable services at resale, under tariffs, or under commercially-negotiated agreements.

Second, to the extent that CompSouth suggests that this Commission might require ILECs to continue to provide mass-market switching and high-capacity facilities after issuance of the D.C. Circuit's mandate, it is mistaken. Any such authority has been preempted by federal law and, in particular, by the D.C. Circuit's decision in *USTA II*.

As an initial matter, courts of appeals have repeatedly found that the 1996 Act preempts state commission attempts to impose unbundling obligations outside of the § 252 process that Congress established. *See, e.g., Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 443 (7th Cir. 2003); *Pac West*, 325 F.3d at 1126-27; *Verizon North Inc. v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002). In the face of existing, binding agreements that affirmatively eliminate certain unbundling obligations once the *USTA II* mandate issues, the Commission could not re-impose those unbundling requirements consistent with the § 252 process.

Such an order would violate not only the procedural requirements of the 1996 Act, but also its substantive standards. As both the Supreme Court and the D.C. Circuit made clear in vacating the FCC's first two attempts to issue UNE rules, Congress did not require "blanket access to incumbents' networks" or determine that "more unbundling is better."

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 390 (1999); *USTA I*, 290 F.3d at 429. Those cases make clear that, instead, "'impairment' [is] the touchstone" to any requirement of unbundling. *USTA I*, 290 F.3d at 429. Therefore, under federal law, there must be a valid finding of impairment under § 251(d)(2) *before* an incumbent may be ordered to provide access to a network element as a UNE, at TELRIC rates. And in *USTA II*, the D.C. Circuit held that this impairment determination must be made *by the FCC* -- and cannot be made by state commissions. *See* 345 F.3d at 565-68. Accordingly, in the absence of a lawful FCC finding of impairment, any state commission order requiring unbundling would be fundamentally *inconsistent* with federal law by requiring unbundling where the 1996 Act, by its terms, does not.

III. CONCLUSION

Because CompSouth's Petition does not seek any relief as to Verizon, and because Verizon will, in any event, continue to honor its existing interconnection agreements, the Commission should not consider taking any action against Verizon.

Respectfully submitted,

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June 10, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on the 11th day of June 2004, I caused copies of the foregoing update to Petition for Arbitration to be served upon the parties on the attached service list by regular mail.

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